

**United States Department of Energy  
Office of General Counsel**

**Implications of the Davis-Bacon Act for Alternative  
Financing**

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## **Davis-Bacon Act**

- Requires payment of the wages and benefits prevailing in the locality for contracts for construction of public buildings or works of the US in excess of \$2,000**
- Usually includes fringe benefits administered through Taft-Hartley trusts for work performed for covered employers in the vicinity**
- Many DOE sites have project labor agreements or site stabilization agreements that are written to cover all work that is construction covered by the Davis-Bacon Act**

**The DOL applies five criteria to determine whether to treat a lease as a contract for DBA :**

- 1. The Length of the Lease.**
- 2. The Extent of Government Involvement in the Construction Project.**
- 3. The Extent to Which the Construction Will Be Used for Private Rather Than Public Purposes.**
- 4. The Extent to Which the Costs of Construction Will Be Paid for by the Lease Payments.**
- 5. Whether the Contract Was Written as a Lease Solely to Evade the Requirements of the Davis-Bacon Act.**

**The Six (very similar) Criteria Used to Determine Whether a Lease Should Be Scored as Capital or Operating Lease:**

- 1. Ownership of the asset (the government must not be using the lease to acquire ownership of a capital asset).**
- 2. The lease price (no bargain-price purchase option).**
- 3. The lease must not exceed 75% of the estimated economic life of the asset.**
- 4. The present value of the minimum lease payments over the life of the lease must not exceed 90% of fair market value.**
- 5. The asset must be a general purpose asset rather than being for the special purpose of the government, and the leased property must not be built to unique Government specifications.**
- 6. There must be a private sector market for the asset.**

**The First ORNL Alternative Financing Transaction:**

**1. The Length of the Lease.**

- DOE could unilaterally, at its sole discretion, and for any reason whatsoever, terminate its use of the facilities to be constructed without any liability, upon one year's notice.**

**2. The Extent of Government Involvement in the Construction Project.**

- a. *DOE did not initiate the project and was not involved in any aspect of the construction.***
- b. The facilities at issue were built and owned by the developer on land DOE no longer owned.**
- c. No DOE money was used to pay for the construction *or preliminary project development matters.***
- d. The design of the project was not subject to any specifications or requirements from DOE.**
- e. DOE did not have the legal means to control or manage this construction, and DOE did not inspect the progress of the work.**
- f. OSHA (a part of the Department of Labor) had determined that DOE did not have the capacity to control this project and that safety and health issues were to be monitored by the Tenn. State OSHA office.**

**3. The Extent to Which the Construction Will Be Used for Private Rather Than Public Purposes.**

- a. Neither DOE nor its contractor are obligated to use or pay for the space after one year's notice of intent to terminate use of the space.**
- b. The space was designed to be appropriate for general, commercial use, and the quitclaim deed expressly contemplates such non-DOE use.**

**4. The Extent to Which the Costs of Construction Will Be Paid for by the Lease Payments.**

- a. DOE has no obligation to use, or pay for the use of, the property after one year's notice of intent to terminate use of the facilities.**
- b. There is no guarantee that DOE's use of the property will result in repayment of the costs of construction.**



**5. Whether the Contract Was Written as a Lease Solely to Evade the Requirements of the Davis-Bacon Act.**

- a. There was no evidence of DOE intent to evade the DBA.**